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# Shipping Law Updates – Fourth Quarter 2020

## Introduction

This is the Fourth Quarter 2020 issue of the Regional Shipping Update of Rajah & Tann Asia's Shipping & International Trade Practice, a publication that provides a snapshot of the key legal issues in various jurisdictions where our member firms have regional presence.

In this issue, we focus on what shipowners should do when a ship is arrested in Thailand. We also discuss recent English cases on arbitration and anti-suit injunctions that have important implications for shipping and shipping law generally.

## Thailand: Arrest of Ships – What Shipowners Should do When a Ship is Arrested in Thailand

Thailand is not a party to any international convention on arresting sea-going ships or maritime liens. The arrest of sea-going ships is governed by the main legislation namely, the Arrest of Ships Act B.E. 2534 (1991) (“ASA”). Under the ASA, a ship could be arrested as a security for a maritime claim held by a creditor only, and the creditor is not permitted to sell the ship that has been arrested. To be entitled to take further actions (among others, seizing and selling the arrested ship), the creditor would have to obtain the Court's judgement on the maritime claim first.

### Requirements for Ship Arrest Petition

#### *Requirement with Respect to the Creditor*

A creditor who is entitled to apply for the ship arrest under the ASA must have a domicile in Thailand.

#### *Requirements Relating to the Ship to be Arrested*

- A ship arrested under the ASA must be a sea-going vessel for the carriage of goods or passengers internationally (and not locally), regardless of her flag.
- A ship arrested under the ASA must be in the possession of the debtor (regardless of its ownership), or owned by the debtor (including sister ships). The exception to this rule is where the claim relates to the ownership of the ship or a mortgage created thereon, whereby the arrested ship must be related to such claim and owned by the debtor only.
- The creditor may apply for the arrest of a ship that is possessed (but not owned) by the debtor only, where the basis of the maritime claim arises out of such ship or a business in connection therewith,

and the debtor possesses the ship both at the time of the maritime claim and upon the submission of the arrest petition.

### **Grounds for Ship Arrest**

The following are the maritime claims based on which the arrest order may be issued:

- Loss of life or personal injury caused by any ship, or which occurs in connection with the operation of any ship;
- Salvage;
- Agreements relating to the use, hire, hire-purchase, or loan of a ship, transport service, or any other similar agreement;
- Agreements relating to the carriage of goods by sea under a bill of lading;
- General average act where the ship owners, the carriers and the owners of such goods as carried in a ship are bound to compensate the owners of a particular property for the loss or damage caused to such property in consequence of an intentional act which is necessarily and reasonably done for the common safety of the ship and goods carried therein, provided that there exists a specific law or mutual agreement governing liability on such matter;
- Loss or damage to properties carried in a ship;
- Towage;
- Pilotage;
- Goods or materials supplied to a ship for its operation or maintenance;
- Construction, repair of or provision of equipment to a ship or dock charges and dues;
- Port facilities or port charges or dues;
- Stevedoring charges;
- Wages of ship masters or personnel;
- Disbursements in connection with a ship which is paid by the charterers, the agents, or the shippers on behalf of the owner or controller of a ship;
- Disputes relating to the ownership of a ship;
- Disputes between co-owners of a ship as to its possession, employment, or earnings;
- Mortgage of a ship.

### **Proceedings of Ship Arrest**

The creditor may submit to the Central Intellectual Property and International Trade Court (“**IP&IT Court**”) a petition for the arrest of the ship, together with relevant evidence. The IP & IT Court will hold an *ex parte* inquiry on an urgent basis and may order the arrest of the ship if it is satisfied, based on the submitted evidence and information, that the maritime claim is valid or arguable. Such order is final and could not be appealed. In addition, the IP & IT Court may require the creditor to pay for certain payments when ordering the ship arrest. These include, among others, the security at 3%–5% of the total amount claimed payable to the IP& IT Court, and the execution fee at 1.5% of the total amount claimed (subject to the maximum of THB 100,000) payable to the Legal Execution Officer.

### **How an Arrested Ship may be Released**

The arrested ship may be ordered to be released by the IP & IT Court in certain circumstances as set out in the ASA. For example, where the creditor fails to bring a maritime claim to the Court within 30 days from the date an executing officer posts the warrant of ship arrest or where the debtor or any interested person suffering from the ship arrest places security with the IP & IT Court in a full amount prescribed in the ship arrest order.

It is further worth noting to the shipowner that the IP & IT Court does not accept the P&I Club's undertaking as a security for releasing of the ship. Generally, the IP & IT Court would only accept the security by cash or by a cashier's cheque issued by the reputable commercial/government bank registered in Thailand only.

In practice, once the IP & IT Court has received the petition to place the security and request for the release of the ship, the IP & IT Court would consider and issue the release order within the same day. However, in order to do the release of ship, the shipowner is required to bring the court's order and deliver the court's order together with the officer of the Legal Executive Department ("**LED**") to the port where the ship is anchored for releasing of the ship. This process would take 1-2 days after the court grants the release order. It is also worth noting that once the court has ordered the refund of the security placed at the IP & IT Court, the IP & IT Court would issue the cashier's cheque of KrungThai Bank PCL or other government bank, and the shipowner is required to deposit such cashier's cheque in its bank account (whether in Thailand or abroad).

### **How to Shift the Ship to New Port When it is Arrested**

In cases where a shipowner is required to discharge or load any cargos from the ship to another port in Thailand during the ship arrest, the shipowner is entitled to submit a petition to the IP & IT Court to request for the shifting of the ship to another port. If the IP & IT Court issues an order allowing the shifting of a ship to another port, the IP & IT Court would require the shipowner to place a security at an amount to be determined by it in the order. In practice, in order to move the vessel, the shipowner has to bring the court's order to the port where the ship was arrested, along with the officer from the LED. At the same time, the destination port will have to be ready for the shifting of vessel as well. Therefore, it would take a few days for the shifting of the ship to the destination port.

### **Claiming for Wrongful Arrest Against the Creditor**

There is no specific provision regarding a wrongful arrest under the ASA. However, theoretically, the debtor would be entitled to claim for damages it incurred based on the wrongful act under the Civil and Commercial Code, which states that "*A person who, willfully or negligently, unlawfully injures the life, body, health, liberty, property, or any right of another person is said to commit a wrongful act (tort under common law) and is bound to make compensation therefor.*" In such a case, the debtor/shipowner must prove to the satisfaction of the Court the actual damages it incurred as a result of such wrongful arrest.

## Conclusion

The ASA provides preliminary protection and security to the creditor with local domicile only. Also, as discussed above, there are some specific requirements in order to release the ship arrested in Thailand. The shipowner would need to consider engaging an experienced lawyer to assist it in the release of the ship and bring the ship back to its normal operation.

## Two Recent English Cases: (1) Court Grants Rare Extension of Time for Commencing Arbitration Proceedings; and (2) Imposing Conditional Terms on an Anti-Suit Injunction

We discuss below two recent important English cases on the granting of an extension of time for arbitration proceedings, and imposing conditional terms on an anti-suit injunction, where Partners from the Shipping & International Trade Practice of Rajah & Tann Singapore were involved as well as in related Singapore proceedings.

### Court Grants Rare Extension of Time for Commencing Arbitration Proceedings

The arbitration process, being a matter of consent between the parties, is fairly strict when it comes to compliance with procedure, such as timelines. Limitation periods are *a fortiori* treated with grave stringency. While courts may be able to grant extensions of time, there are limited grounds on which they can do so, and commercial judges are generally very circumspect about interfering with the arbitration process or otherwise being perceived as depriving a party of an accrued time bar defence.

As such, a court order granting an extension of time for commencing arbitration proceedings is less than common. In *Times Trading Corporation v National Bank of Fujairah (Dubai Branch)* [2020] EWHC 1983 (Comm), the English High Court had to consider an application for such an extension. The Court's decision was in the ultimate analysis driven largely on whether the conduct of the respondent made it unjust to hold the applicant to the relevant time bar.

The Court found that the applicant in this case had been misled by conduct attributable to the respondent into pursuing proceedings against the wrong party, and thus should not be held to any resultant failure to meet the time bar for initiating a claim in arbitration against the respondent. Relying on section 12 of the UK Arbitration Act 1996, the Court granted the applicant an extension of time to commence arbitration proceedings against the respondent.

[Kendall Tan](#) and [Max Lim](#) from the [Shipping & International Trade Practice](#) of Rajah & Tann Singapore acted for the applicant bank in related Singapore proceedings, as well as in the conduct of the English court proceedings in conjunction with Messrs Campbell Johnston Clark and instructed Counsel.

For more information, please click [here](#) to read our Legal Update.

### Imposing Conditional Terms on an Anti-Suit Injunction

The law of anti-suit injunctions has been the subject of much discussion before the courts, particularly in the context of arbitration agreements. As a discretionary form of relief, the court may take into account the relevant factors in deciding whether to grant an anti-suit injunction.

In *Times Trading Corporation v National Bank of Fujairah (Dubai Branch)* [2020] EQHC 1078 (Comms), the English High Court demonstrated the scope of exercise of its discretion, declining to grant an anti-suit injunction as applied for, but imposing conditional terms on the injunction instead.

The case involved a bank which had brought court proceedings in Singapore against the owners and/or demise charterers of the vessel "Archangelos Gabriel" ("**Vessel**"). Before the English court, the demise charterers ("**applicant**") applied for an anti-suit injunction of the Singapore proceedings in favour of arbitration. It was alleged that the demise charterers (and not the owners) were liable to the bank on their claims, and that the time limit for commencing arbitration proceedings against the demise charterers had passed. The English court, taking into account all the circumstances, including the actions of the applicant in causing the deadline to be missed and the lack of unreasonableness on the part of the bank, granted an injunction on the condition that the applicant would not rely on the time bar argument in the arbitration.

The decision marks a rare instance where the English courts have imposed such a condition in the grant of an anti-suit injunction. It also provides some insight of how the court will exercise its discretion to achieve a fair and just outcome.

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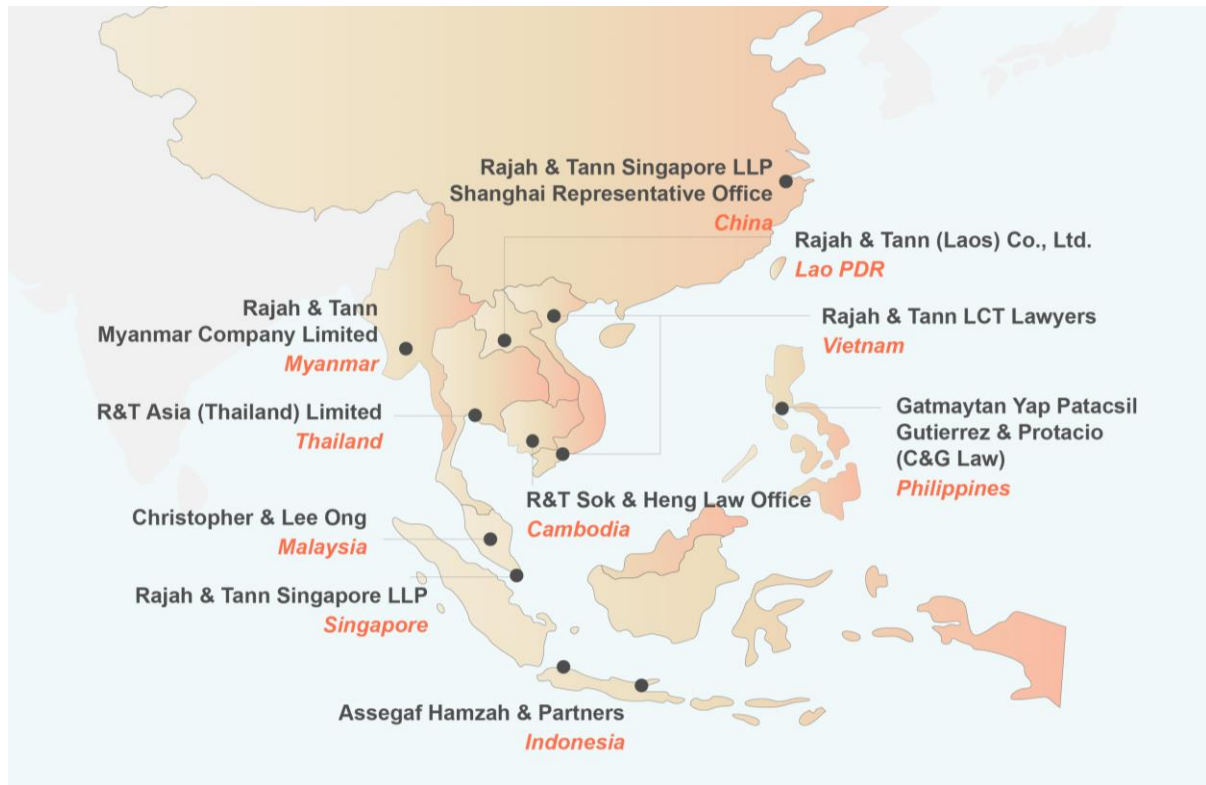
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